Supreme Ct.

(1)

No. 98 37 JUL 2 - 1998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PAUL TALANDA,

Petitioner,

v.

KFC NATIONAL MANAGEMENT COMPANY, a Delaware Corporation, doing business as KFC, also known as KENTUCKY FRIED CHICKEN, a Delaware Corporation and a subsidiary of PEPSICO, INC., a North Carolina Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What, if any, steps must individuals take, prior to opposing what they believe to be a discriminatory order under the Americans With Disabilities Act of 1990 ("ADA"), to ensure that the conduct they are opposing does in fact violate the ADA?

2. In determining whether an employee's opposition to discrimination is valid, what is the proper standard to impose?

PARTIES

Petitioner Paul Talanda is a former employee of KFC National Management Company which is a subsidiary of KFC Corporation and PEPSICO, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Paul Talanda petitions for a writ of certiorari to the United States Supreme Court to review the decision and judgment in *Talanda v. KFC National Management Company, et al.*, 140 F.3d 1090 (1998). Paul Talanda was fired for insubordination after he refused to carry out a directive by his supervisor to move a cosmetically disfigured employee out of the sight of customers. The Seventh Circuit held that Talanda did not have a cause of action for retaliation because he did not show that he had a reasonable belief that the subordinate he was protecting was regarded and treated as having an impairment which limited the major life activity of working and because he did not show that the subordinate was in fact covered under the ADA. This decision by the Seventh Circuit conflicts with the other Circuits regarding the standard imposed in the opposition clause for retaliation. There are now four different standards utilized by the various Circuit Courts in determining if a cause of action is valid under the opposition clause for retaliation. Because of the four different standards within the Circuits and because the Seventh Circuit's opinion contravenes the purpose of the retaliation clause under the ADA, petitioner prays that his petition be granted.

OPINIONS BELOW

The Report and Recommended Order of the Magistrate Judge for the Northern District of Illinois dated May 31, 1996 is unreported and is reprinted herein at App. 17. The Memorandum Opinion and Order of the

District Court for the Northern District of Illinois dated March 31, 1997 entering judgment to the defendant as a matter of law pursuant to Federal Rule of Civil Procedure 56 is also unreported and is reprinted herein at App. 61. The Opinion of the United States Court of Appeals for the Seventh Circuit dated April 7, 1998 is reported at 140 F.3d 1090 and is reprinted at App. 1-16.

JURISDICTION

The opinion of the United States Court of Appeals was decided on April 7, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 12203 of the Americans With Disabilities Act of 1990 ("ADA") codifies the retaliation provision under the ADA.

STATEMENT OF THE CASE

Paul Talanda's supervisor required, as a condition of his employment with KFC, that he violate the ADA. After Talanda refused to comply with his supervisor's discriminatory directive, he was fired for "insubordination."

Talanda's position at the time that he was fired was that of restaurant manager of a KFC restaurant in McHenry, Illinois. Talanda's employment record with KFC was exemplary. Talanda had been an employee of KFC since high school, and in his fifteen years with KFC Talanda consistently received positive and glowing

performance reviews and raises. His supervisor and human resources signed Talanda's last review on August 28, 1993.

Shortly after that review, Talanda hired Dorothy Bellson (herein after "Bellson") to work in his store as a customer service worker. Talanda felt, based on his experience and background, that Bellson was qualified to greet and serve customers. Bellson also had a facial disfigurement.

On Bellson's first day at work Talanda's supervisor, Overly, made a stop at Talanda's restaurant and briefly observed Bellson. Later, Overly telephoned Talanda and directed Talanda to remove Bellson away from the view of customers because she feared that Bellson's facial disfigurement would scare away customers.

Talanda advised Overly that Bellson was doing a good job and was qualified for the position. Despite Talanda's opinion, Overly was adamant that Bellson be removed from the sight of customers. Overly documented her discriminatory request in a memo, which stated that she was concerned about having Bellson on the front counter due to her "severe dental problems."

Although Talanda had no formal training in anti-discrimination laws, Talanda believed that it was wrong to take action against an employee because of a facial disfigurement.

Talanda did not remove Bellson out of the sight of customers. Two days later, Talanda and Overly had a second conversation in which Talanda explained to Overly that he had worked the entire day with Bellson and that there were no problems. Overly insisted that

Bellson be moved and told Talanda he would be in trouble if he did not follow her directive. Talanda believed that Overly was being discriminatory and he did not remove Bellson from the customer service position. Talanda knew that Bellson was qualified for the position for which he hired her, and he had no problems with her performance.

On October 19, 1993, six weeks after his review, Talanda was fired for insubordination for refusing to follow his supervisor's directive to move Bellson out of customer service and away from customers. Prior to his termination Talanda was called into the office of the human resource director, Malloy, who demanded to know why Talanda refused to move Bellson out of the sight of customers as had been requested by Overly. Malloy told Talanda that he was being insubordinate in refusing Overly's request.

Immediately after Talanda was fired, he filed a charge with the EEOC alleging retaliation under the ADA and filed his lawsuit in the Northern District of Illinois. The District Court granted Defendant's Motion for Summary Judgment and denied Talanda's Partial Motion for Summary Judgment holding that it was only a "minor slight" to hide a cosmetically disfigured employee in the back of the restaurant and therefore Talanda's activities in opposing that transfer were not protected under the ADA. The District Court utilized the objective "reasonableness" standard in determining that there were insufficient material facts to submit the case to a jury. The Seventh Circuit upheld Summary Judgment for the defendant and in so doing took the "reasonableness test" one step further. The Seventh Circuit held that Talanda's case "faltered" because he was unable to show

that he reasonably believed that defendant perceived Bellson as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." (*Id.* at 1096-97)

REASONS FOR GRANTING THE WRIT

The majority of the Circuits have required that persons who are opposing the discrimination of another either have (1) a subjective good faith belief that their actions are in opposition to discrimination,[1] (2) an objective "reasonable person" standard,[2] or (3) a combination of the objective and subjective tests.[3] The Sev-

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[1] 1st CIRCUIT – *Monteiro v. Poole Silver Co.*, 615 F.2d 8 (1980); 10th CIRCUIT – *Love v. Re/Max of Am.*, 738 F.2d 383 (1984).

[2] D.C. CIRCUIT – *Parker v. Baltimore & Ohio Railroad Company*, 904 F.2d 853 (1990); 3d CIRCUIT – *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (1990); 4th CIRCUIT – *Mayo v. Kiwest Corp.*, 94 F.3d 641 (1996); 6th CIRCUIT – *Texler v. County of Summit Board of Mental Retardation and Developmental Disabilities*, 25 F.3d 1050 (1994); 8th CIRCUIT – *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146 (1981), *cert. denied* 455 U.S. 976 (1982); 9th CIRCUIT – *Gifford v. Santa Fe Ry.*, 685 F.2d 1149 (1982) (relying on *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978)).

[3] 2d CIRCUIT – *Manoharan v. Columbia College*, 842 F.2d 590 (1988); 11th CIRCUIT – *Meeks v. Computer Associates International*, 15 F.3d 1013 (1994) (relying on *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491 (11th Cir. 1989) and *Payne v. McLemore's Wholesale and Retail Stores*, 654 F.2d 1130 (5th Cir. 1981) (*reh'g denied* 660 F.2d 497 (1981)), *cert. denied* 455 U.S. 1000 (1982).

enth Circuit in *Talanda* added a fourth test of "legal certainty" by requiring individuals opposing discrimination to have a reasonable belief that the employee they are attempting to protect actually has a viable claim of discrimination. In other words in the Seventh Circuit, when opposing the discrimination of another under the ADA, individuals must first take steps to ensure that the conduct they are opposing does in fact violate the ADA before they can prevail in a claim for retaliation in opposing that conduct.

The standard imposed by the Seventh Circuit and the absence of a consistent standard in the other Circuits puts a chill over legitimate opposition to discrimination by third parties, by providing a remedy only to those who are not only right, but convinced, that the conduct they are opposing does in fact violate the law.

In *Talanda* the Seventh Circuit held that Mr. Talanda's case faltered because the person he was trying to protect did not, according to the Seventh Circuit, actually have a disability that was protected under the ADA that substantially limited one or more of her major life activities under the ADA. (*Id.* at 1096) The Seventh Circuit's legal certainty test places a greater burden on those who seek the protection of the opposition clause than that required by those who file charges of discrimination with the EEOC and are later retaliated against by their employer. The Seventh Circuit went on to hold in *Talanda* that a viable claim for retaliation under the ADA required a showing that Talanda reasonably believed that Bellson was, or was perceived by KFC as, "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average

person having comparable training, skills and abilities." (*Id.* at 1097)

However, the starting point for interpretation of a statute should be the language of the statute itself. The standards asserted by the Seventh Circuit and the other Circuits have no basis in the statute because a requirement of "reasonable belief", "good faith belief" or "legal certainty" is absent from the language of the opposition clause of the ADA. The protection from retaliation should involve the standard of inquiry found in the statute: was the protected activity at issue (in this case Talanda's right under the opposition clause of the ADA to not be forced to discriminate against employees who he is in charge of) connected to the adverse employment action? In Talanda's case the termination was in direct response to his refusal to hide a disfigured employee from customers.

The retaliation provision of the ADA states:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> It shall be unlawful to coerce, intimidate threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted by this chapter.

42 U.S.C. § 12203.

Under the ADA, the rights that are granted include the right to be free from discrimination including,

"segregating or classifying . . . an employee in a way that adversely affects the opportunities or status (of the) employee because of the disability." 42 U.S.C. § 12112. Whether or not Bellson had a valid claim under the ADA should not be determinative in Talanda's cause of action for retaliation in opposing a directive to segregate Bellson away from the view of the customers. Talanda's belief should be sufficient to allow him to bring his case before a jury, and the language of the statute supports Talanda's belief that the directive given to him was in fact a violation of the law.

The Seventh Circuit's restriction on opposition clause retaliation claims, which imposes a legal certainty on opponents of discrimination prior to opposing that conduct, chills the very conduct that the retaliation clause seeks to encourage. Discrimination cannot be eradicated if those who oppose the discrimination of others must first seek legal advice and legal certainty before opposing discriminatory orders. Even the standards imposed by the other Circuits, which include objective reasonableness, subjective good faith and a hybrid of the two, do not provide any greater clarification, leaving individuals uncertain whether or not their conduct in opposition to discrimination is protected, without first obtaining legal advice.

The public policy for the opposition clause is to protect those individuals who speak out against the discrimination of others. Those individuals must be secure in their protest. The only test that will provide security and encourage individuals to speak out against the discrimination of those around them is to analyze the claim based on the statutory language. Even if an individual's

opposition is based upon a mistaken understanding of the law, the individual must be protected if he or she had a belief that a discriminatory practice existed.

CONCLUSION

For all the reasons stated above, petitioner Paul Talanda respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit and reverse the opinion of the Seventh Circuit affirming Summary Judgment for the defendant.

Respectfully submitted,

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